IN THE HIGH COURT OF JUDICATAURE FOR RAJASTHAN AT

JODHPUR.

JUDGMENT.

Smt. Jhankar Bai vs. Fateh Kishan &ors.

S.B.Civil Misc.Appeal No.554/1994 against the judgment dated 25.4.94 passed by the learned Addl. District Judge No.1, Udaipur Civil Appeal No.8/90.

Date of Judgment: November 09,2006.

PRESENT.
HON'BLE MR. PRAKASH TATIA, J.

Mr. Jitendra Chopra for the appellant.
Mr. R.S. Mankad & Mr. Dilip Kawadia for the respondents.

BY THE COURT:

Heard learned counsel for the parties.

The appellant is aggrieved against the order dated 25.4.1994 by which the first appellate court dismissed the appeal of the appellant as abated.

It will be worthwhile to narrate few facts of the suit filed by the plaintiff. According to the sole plaintiff Smt. Jhankar Bai, the suit property was mortgated 112 years ago in the year 1882 to three persons Srikishan, Jai Kishan and Bal Kishan for a consideration of Rs.2100/-. The mortgage was for 21 years. The mortgagor Nand Sagar Yati died in the

year 1959 and his legal representatives Dal Chand sold the house in question to the plaintiff Smt. Jhankar Bai on 11.11.1959 and therefore, the plaintiff got the right to re-deem the property. According to the plaintiff, the ultimate mortgagee was Smt. Shanta Bai and defendant no. 2 Fateh Kishan claimed that he is also heir of the mortgagee and he sub-mortgaged some of mortgaged portion of defendant no.4 Ram Lal. Bal Kishan (defendant no.3) was impleaded as party because Shanta Bai sold the portion of the house to one Udai Lal on 31.8.1939. One more defendant Bhawani Singh was impleaded by the plaintiff on the ground that the possession of the some portion of the house has been given to one Bhawani Singh by Shanta Bai.

The trial court dismissed the suit of the plaintiff vide judgment and decree dated 3.1.1966. The trial court dismissed the suit on the ground Smt. Jhankar Bai failed to prove that she was legal representative of alleged mortgagor Nand Sagar Yati. The Regular First Appeal was preferred by the plaintiff against the judgment and decree of the trial court dated 3.1.1966. During the pendency of the appeal, defendant no.5 Bhawani Singh died on 29.5.1969. No application for impleading any of the legal representatives of Bhanwani Singh was filed by the appellant-plaintiff till 14.12.1974. When the plaintiff appellant submitted application under Order 22 Rule 4, C.P.C. for bringing on record the legal representatives of deceased Bhanwani Singh, who died

on 29.5.1969, the first appellate court dismissed the said application and also dismissed the appeal as abated. The order of the trial court was challenged by the plaintiff-appellant before this Court by filing S.B.Civil Regular Second Appeal No.352/75. The second appeal was allowed by the High Court vide judgment dated 21.6.1988 and the first appeal was remanded back to the first appellate court with direction that notice of the application under Order 22 Rule 4, C.P.C. be issued to the daughters of deceased defendant-respondent Bhawani Singh and, thereafter, the first appellate court may decide the application afresh. This Court also allowed the parties to raise all their objections which have been raised in the second appeal.

After the remand order dated 21.6.1988, the trial court issued notices to the daughters of deceased Bhawani Singh but no body put in appearance on behalf of the legal representatives of Bhawani Singh.

Before the first appellate court, defendant no.2 Fateh Kishan submitted an application on 4.3.1994 stating therein that defendant-respondent Shanta Bai, the mortgagee as well as defendant no.4 Bhawani Singh have already died. The defendant-plaintiff-appellant has not taken any steps to bring on record the legal representatives of said respondent. The first appellate court found that Smt. Shanta Bai died on 5.11.1985 even before this Court decided Second Appeal No.352/95 vide judgment dated 21.6.1988. This is not in dispute that Smt. Shanta

Bai and Ram Lal both died. For Smt. Shanta Bai, the appellant submitted that she died leaving no legal representative and, therefore, no legal representative has been impleaded by the appellant in the appeal after death of Smt. Shanta Bai. However, it is also stated by the appellant-plaintiff in her application that according to defendant Fateh Kishan, he is adopted son of Smt. Shanta Bai but that fact has been denied by Smt.Shanta Bai in her life time. Be it as it may be, according to the appellant, there is no legal representative of Smt.Shanta Bai. The trial court held that after the death of Smt. Shanta Bai on 5.1.1985, no steps have been taken by the plaintiff-appellant to bring on record the legal representative of Smt. Shanta Bai. The first appellate court held that in view of the above, the appeal of the appellant has abated.

According to the learned counsel for the appellant Smt. Shanta Bai left legal heir Fateh Kishan, who is already party in the first appeal, therefore, the appeal has not abated. It is also submitted that Ram Lal and Bhawani Singh also died. Bhawani Singh was the person in possession only in the house property and had no right, title or interest in the property. It is also submitted that even if it is held that the appeal of the appellate has abated against Bhawani Singh then the appellant-plaintiff may not get possession of the part of the property which was in possession of Bhawani Singh. It is also submitted that Bhawani Singh's legal representatives have not denied this fact that

before the decision of the suit, Bhawani Singh vacated the suit property.

It appears from the facts mentioned above itself that according to the plaintiff Shanta Bai was the sole mortgagee. According to the plaintiff-appellant herself Shanta Bai died on 5.11.1985 and according to the plaintiff-appellant, Fateh Kishan was not the son of Smt. Shanta Bai, was the stand taken by Smt. Shanta Bai in her life time. According to the appellant, Smt.Shanta Bai had no legal representative but that fact appears to be wrong because of the reason that according to the plaintiff-appellant, Smt. Shanta Bai's husband had brother and who has son also. Apart from it, if Smt. Shanta Baik had no heir then the plaintiff-appellant did not seek any permission for appointing guardian for the estate of deceased Smt. Shanta Bai since 5.11.1985 till the objection was raised by the respondent by filing application on 4.3.1994. Therefore, the plea taken by the appellant in reply to the application filed by the respondent and before this Court, appears to be afterthought only and in view of the above I do not find that the court below has committed any error of fact in holding that the appeal has abated.

There is no merit in this appeal and hence the appeal of the appellant is hereby dismissed.

(PRAKASH TATIA),J.

mlt.